## RECENT AMERICAN DECISIONS.

### *Supreme Judicial Court of Maine.*

### GEORGE W. PRENTISS *v.* ELISHA W. SHAW ET AL.

The plaintiff was unlawfully seized by the defendants, carried thence three miles and confined in a room several hours, and thence to a town meeting, where he took an oath to support the Constitution of the United States, and was discharged. In the trial of an action of trespass, based upon these facts, the plaintiff claimed, (1.) Actual damages resulting from his seizure and detention; (2.) Damages for the indignity thereby suffered; and (3.) Punitive damages. *Held*:—

1. That the plaintiff was entitled to recover full pecuniary indemnity for the actual corporeal injury received, and for the actual damages directly resulting therefrom, such as loss of time, expense of cure, and the like;

2. That the declarations of the plaintiff, made prior to the unlawful arrest and tending to provoke the same, not being a legal justification thereof, are inadmissible in mitigation of the actual damages; but,

3. That such declaration made on the same day, and communicated to the defendants prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest, indicative of the motives, provocations, and conduct of both parties, are admissible upon the question of damages claimed upon the other two grounds.

ON EXCEPTIONS.

The writ was dated June 15th 1867, and contained a declaration in trespass, substantially alleging that Elisha W. Shaw (a deputy sheriff), Putnam Wilson, Jr., Oliver B. Rowe, Hollis J.

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*Imperial Court of Paris.*

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| Judges of Appeal, | | 63 |
| " | Tribunal of First Instance, in the city of Paris, | 65 |
| " | the other Districts, | 216 |
| " | Tribunal of Commerce, | 27 |
| " | Court of Prudhommes, | 15 |
| " | Proportional part of the Court of Cassation, | 5 |
| | Total, | 391 |

RECAPITULATION.

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| Territory of Imperial Court of Paris (judges), | 391 |
| State of New York (judges), | 295 |
| | 96 |

In this comparison justices of peace in both are omitted, as the number in this proportional part of France could not be ascertained, nor the number of judges of tribunals of simple police, though both are known to be proportionally greater than in New York.

Rowe, and Daniel Dudley, on the 15th April 1865, at Newport, with force and arms, assaulted, beat, and bruised the plaintiff, thereby permanently injuring his hip and back, violently forcing him into and locking him in a room in the Shaw House, subjecting him to remain there five hours, violently taking from thence into a carriage and carrying him against his will to the town-house in Newport.

The plaintiff introduced evidence tending to show that in April 1865, while he was at a blacksmith's shop in Newport, where he was having his horses shod, Shaw, Dudley, Wilson, and H. J. Rowe seized him, and forcibly putting him into a wagon, transported him a prisoner three miles distant, to Newport village, and confined him for several hours in a room in the hotel there; that a crowd of men accompanied the four defendants to the shop and from thence to Newport village; that the four defendants inflicted injuries upon the person of the plaintiff; and that threats of extreme personal injuries were made to the plaintiff, both at the blacksmith shop and at Newport village, by some persons.

There was conflicting testimony as to the extent of the injuries to the plaintiff's person.

The defendants, against the objections of the plaintiff, introduced evidence tending to show that the four defendants seized the plaintiff in the forenoon of the day on which the news of the assassination of President Lincoln was received; that when the plaintiff stepped into the blacksmith shop he, addressing one Gilman (who was a witness in this case), said: "He that draweth the sword shall perish by the sword, and their joy shall be turned into mourning;" that Gilman (alluding to the assassination of the President) said to the plaintiff: "I suppose there are some who are glad of it;" that the plaintiff thereupon replied: "Yes; I am glad of it; and there are fifty more in town who would say so if they dared to;" that Gilman rejoined that the plaintiff would be glad to take those words back; that the plaintiff responded substantially that he would not; and that Gilman thereupon informed the plaintiff he should report him.

On cross-examination, Gilman testified that he thought that the plaintiff, when speaking of the assassination, said it might stop the further effusion of blood.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that the blacksmith shop

was three miles from Newport village, where three of the defendants were; that Gilman, in about twenty minutes after his conversation with the plaintiff, told it to the defendant Wilson; that Gilman and Wilson went to Newport village and informed the four defendants of the plaintiff's declarations concerning the assassination; that, about two hours afterwards, the four defendants proceeded to the blacksmith shop and did the act proved by the plaintiff; that there was great excitement in the public mind upon the receipt of the news of the assassination.

The plaintiff seasonably objected to the admission of the alleged declarations of the plaintiff, made to Gilman that day; but the presiding judge ruled that the plaintiff's declarations made that day, concerning the assassination of the President, might be given in evidence *de bene esse*, it having been stated by the defendants' counsel that they should prove the same had been communicated to the defendants before their arrest of the plaintiff.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that, after the confinement of the plaintiff in the hotel, he was taken by them, on the same day, to a public meeting of the citizens, called at the town-house, at which a moderator and clerk were chosen, and acted officially; that, at the meeting, a vote was passed that the plaintiff be discharged upon his taking an oath to support the Constitution of the United States; and that the plaintiff voluntarily took such oath and was thereupon discharged.

The defendants also introduced evidence tending to show, that, before arresting the plaintiff, telegraphic communication, relative to the plaintiff's declarations concerning the assassination, was had with the provost-marshal at Bangor, who replied by telegraph, that he should be arrested and held; that thereupon the defendant Shaw, then an acting deputy sheriff, with three other defendants, acting under his orders, proceeded to make the arrest; and that they honestly believed that they had a legal right to do what they did, and had no malice towards the plaintiff.

As to the four defendants proved to have been present (and the other, if found to have participated), the presiding judge instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty; that the only question for the jury was the amount of damages; that the plaintiff claims damages on three grounds:—

1. For the actual injury to his person and for his detention;

2. For the injury to his feelings, the indignity, and the public exposure; and,

3. For punitive or exemplary damages.

That they were bound to give, at all events, damages to the full extent for the injuries to the plaintiff's person and for his detention.

That, as to damages for the second and third grounds, it was for the jury to determine, on the whole evidence, whether any should be allowed, and the amount.

The presiding judge explained to the jury the nature and grounds of such damage, and instructed them, *inter alia*, that they could only consider the evidence introduced by the defendants under the second and third heads above set forth, and in mitigation of any damages they might find under either or both of said heads, if, in their judgment, those facts did mitigate such damages; but that they could not consider them under the first head.

The jury acquitted O. B. Rowe, and found a verdict of guilty against the other defendants, and assessed damages in the sum of $6.46. Whereupon the plaintiff alleged exceptions.

*W. H. McCrillis*, for the plaintiff, contended, *inter alia*, that the language of the plaintiff was not a sufficient provocation. It was not personal to any of the defendants: *Corning* v. *Corning*, 2 Selden 97; *Ellsworth* v. *Thompson*, 13 Wend. 658.

Sufficient provocation cannot be proved in mitigation when the assault and battery were deliberately committed. The assault must accompany the provocation before the blood has time to cool. The question is, was there time for a reasonable man to reflect, and not whether the defendants continued in a state of passion: *Cope* v. *Sullivan*, 3 Selden 400; *Avery* v. *Ray*, 1 Mass. 11; *Lee* v. *Woolsey*, 19 Johns. 319; *Willis* v. *Forrest*, 2 Duer 318.

Words cannot constitute justification. Words can never be sufficient provocation. They may provoke extreme anger, and the anger be admitted in mitigation. But, if the blood has time to cool, the assault is regarded as deliberately done and cannot be mitigated. Any other rule would be subversive of the order of society.

*L. Barker*, for the defendants.

KENT, J.—The case, as presented to the jury under the rulings, was, in substance and effect, one where a default had been entered and an inquisition of damages had been allowed before a jury. The jury had no discretion allowed to them, except as to the amount of damages to be inserted in a verdict for the plaintiff. The main question is whether the directions given by the judge to the jury to govern them in the assessment of damages were correct.

The plaintiff claimed damages for several distinct matters, and asked that the jury should found their verdict on these principles, viz. :—

1. The actual injury to his person and the detention and imprisonment.

2. The injury to his feelings, the indignity and public exposure and contumely.

3. Punitive or exemplary damages in the nature of punishment, and as a warning to others not to offend in like manner.

The judge very unequivocally instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty, and that the only question for them was the amount of damages,—that they were bound to give damages at all events for the injuries to the plaintiff's person, and for detention to the full extent of said damages; that they could not consider the testimony put in by defendants in mitigation of such actual damages, but must give a verdict for matters named under the 1st head to the full amount proved without diminution, on account of any matters of provocation, or in extenuation.

The judge further instructed the jury that they might consider the testimony put in by defendants under the 2d and 3d heads, above stated, in mitigation of any damages they might find the plaintiff had sustained under either or both of said grounds.

These rulings present the question whether the evidence objected to was admissible for the special purpose to which it was confined. It was not in the case generally, but its consideration and application was restricted to the special grounds of damages set up beyond what may properly be termed the actual damages. It was entirely excluded as a justification, or as mitigating in any degree the actual damages.

The distinctive points of the rulings which perhaps distinguish them from some cases in the reports, and some doctrines in the

text-books, are, first, that they exclude entirely this species of evidence in mitigation of actual damages,—and, secondly, that they admit it in mitigation of damages, claimed on the other grounds of injury to the feelings, indignity, and punitive damages, although the evidence related to matters which did not transpire at the instant of the assault, but on the same day, and manifestly connected directly with the infliction of the injury complained of.

It is unquestionable that many authorities can be found which seem to negative the proposition that acts or words of provocation, except those done or uttered at the moment, or immediately connected in time with the infliction of the injury, can be given in evidence in mitigation of damages. But most of these cases seem to be predicated upon the idea of mitigation of the positive, visible damages,—those damages to which the party would be entitled on account of the actual injury to his person or his property.

It is important to settle, as well as we can, the general principle which lies at the foundation of the law applicable to damages, occasioned by the illegal acts of the defendant. We understand that rule to be this—a party shall recover, as a pecuniary recompense, the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. But, in the application of this general principle, there has been great diversity in the decisions, and in the doctrines to be found in the text-books touching the point of mitigation or extenuation.

In reference to injuries to the person, it was soon seen that this literal and limited rule, if applied inexorably, would fail to do justice. The case is at once suggested, where an assault and battery is shown to have been wanton, unprovoked, and grossly insulting; inflicted clearly for the purpose of disgracing the recipient, and at such a time or place as would give publicity to the act, and yet the actual injury to the person very slight, or hardly appreciable. Shall the law, in such a case of wanton insult and injury, give only the damages to the face or the person, as testified to by a surgeon?

On the other hand, a case is suggested, where the injury to the person was severe, a broken limb or grievous wounds, or permanent or partial disability, and yet the party suffering had been

guilty of gross abuse, provoking the assault by insulting language or false accusations, or most offensive libels upon the defendant or his family, or had outraged the community in which he lived, by a series of acts or declarations which justly aroused and kept alive the indignation, which at last found vent in the infliction of some personal indignity, accompanied by force and violence, which resulted in the serious manner above stated. What is the rule as to such damages, applied to the aggravations in the one case, and the mitigations in the other?

If we take the case of such an assault, which has been provoked by words or acts at the time of the trespass, and so immediately connected therewith that all authorities would agree in admitting the evidence in mitigation, the precise question then is, for what purpose can it be used, and what damages can it mitigate?

All agree that these facts cannot be a legal justification, and be used in bar of the action. The plaintiff is undoubtedly entitled to a verdict, with damages. It is said these facts may be used to mitigate the damages. But what damages? If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated—that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act? Admit that the defendant was provoked, insulted, irritated, and justly indignant at the acts or language of the plaintiff. If those provocations did not reach the point of a legal justification of the assault, then, so far as the question arises for which party the verdict shall be given, they are immaterial, and out of the case. The assault was wholly legal or wholly illegal. There can be no such thing as apportioning the guilt; making the act half legal and half illegal. It is not one of the class of cases where the suffering party contributed to the injury, and thereby lost his right of action. The contribution, to work that effect, must be co-operation in the doing of the act itself, which is complained of,—i. e., the assault and battery; or whatever the alleged specific act may be.

If then the act is confessedly an illegal one, and unjustified in law, why must not the defendant answer for and pay the actual

damages to the person? On what principle of law can he be exonerated?

In the case before us the presiding judge took this view. He made a distinction which has not often been attended to, between a recovery for the actual personal damage and loss of time and other direct injuries, and a recovery for other damages based on injury to the feelings, indignity, insults, and the like, and also on the claim for punitive damages.

Is there not such a distinction in law and common sense? Take the simple case of the meeting of two men in a public street. One addresses the other with opprobrious and insulting language, calling him a thief or a liar. The other, at the moment, naturally excited to almost uncontrollable anger, strikes a blow which breaks the arm of his antagonist. The law says the words were no legal justification for the blow. It was therefore a trespass and a wrong. What damages shall be awarded? Can they be more or less, according to the provocation on one side or the natural anger on the other? There is the broken arm, neither more nor less, with the pain and suffering and expense of cure, and the loss of time, all which are open and appreciable, and are the direct and immediate consequences of the legal wrong. If the law holds, as it does, sternly and unwaveringly, that the words are no excuse or justification, why should it "keep the word of promise to the ear but break it to the hope," by allowing a jury to evade the law, whilst in form keeping it by a verdict for nominal damages, which is in effect one in favor of the defendant? Why not say rather that the provocation might be shown in defence of the action, and that if the plaintiff morally deserved to suffer the injury by reason of his language, that should be a legal excuse? It seems to be a legal anomaly to say, true, it is an undefended, naked trespass and wrong, but no real damages or recompense shall be given. It is giving the benefit of a justification to what the law expressly says is no justification. The restriction of the rule to the provocation given at the time of the assault, does not obviate the objection that it is against a well-settled principle which gives real and substantial redress for every unjustified trespass. Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had

broken his horse's leg, in the case before stated, must not the defendant be held to pay the full value of the horse thus rendered useless? Or in case of trespass on land, can the actual damage be mitigated by showing that it was provoked by unfriendly or unneighborly words? Or in case of a damage at sea, could an intentional and unnecessary collision be mitigated, so far as the actual injury was in question, by proving that the navigator was insulted and irritated by taunting and exciting language from the deck of the injured vessel?

But there is no doubt that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show on one side aggravation, and on the other, mitigation of the damages claimed. Verdicts for heavy damages have been sustained where the actual injury to the person was very slight or merely constructive, and other verdicts for merely nominal damages have been confirmed where the actual injuries were shown to have been serious. In the first class of such cases the plaintiff has not been restricted to proof of the injury to the person, but has been allowed to show the circumstances attending the act, and to have damages for the insult, indignity, injury to his feelings, and for the wanton malice and unprovoked malignity of the deed. And it is now settled, certainly in this state, that he may be allowed, in addition, exemplary damages in the way of punishment or warning to the transgressor and others.

Now this opens a wide field for uncertain or speculative damages for matters not tangible or susceptible of accurate estimation, but based upon principles and considerations different from those which determine the actual injuries as before described. These are such as lie patent, and require only a calculation of time lost, pain suffered, or the value of a permanently injured limb, or the like. But when the injury to the feelings, the insult, the mortification, the wounded pride, or, to sum up all in one word, the indignity, are pressed as grounds for pecuniary indemnity, superadded to the claim for punitive and exemplary damages, they evidently and necessarily require a consideration of all the facts in any way clearly and fairly connected with the trespass, and bearing upon the motives, provocations, and conduct of both parties in the controversy, which has culminated in an assault by one upon the other. How otherwise can a jury fairly estimate what should be awarded by way of punishment, or as a reasonable satis-

faction for injured feelings? These damages, as our law now stands, are made up of injuries partly private and partly public in their nature. If evidence of this nature, admitted to enhance the actual damages to the person, may be given, why should not the same kind of evidence be given by way of mitigation of damages claimed on such grounds?

If the plaintiff restricts himself distinctly to the single claim for the actual damages to his person, and the direct, tangible results therefrom, and expressly waives all claim beyond, it would seem that the defendant should be limited to matters strictly in defence or justification of his act, as in other cases of trespass. But if, as in this case, he claims beyond this, for injured feelings and for punishment, the question arises (which is the main question made by the plaintiff), what is the limit of the evidence which may be admitted in mitigation or extenuation? It is not denied that some evidence of this nature is admissible. The precise question is whether it is to be confined to what transpired at the time of, or in immediate connection with the act. If a party claims damages not merely for the naked assault, but for his wounded feelings, and seeks to inflame them by showing that he had been publicly insulted by opprobrious language used with the evident intent to degrade him in the eyes of his fellow-citizens, may not the defendant be allowed to show that the complainant had himself been guilty of using like words, or by his conduct and by insults and provocations had really been the cause of the assault? The plaintiff may have been passive and silent at the moment of the assault, whilst the defendant was violent and denunciatory, and, if no facts can be shown beyond those transpiring at that meeting, the plaintiff would present a case, apparently calling for exemplary damages, whilst, if the whole truth was brought out, the defendant would appear the least in fault, so far as regards provocation.

And so, if the plaintiff claims for damages of this nature, for an assault, not by a personal enemy, but by those whose indignation had been aroused in matters of a general and public nature, may not all damages, beyond those actually suffered in his person, be modified or affected by evidence of his acts or declarations, calculated to arouse a just indignation and disgust? Why should the man who has intentionally and grossly outraged decency, or aroused indignation by his violation of common humanity, be

allowed to recover for his injured feelings, and the public degradation to which he has been subjected? Or rather, why should not a jury be allowed to know all the facts, directly connected with the act, although not transpiring at the moment, and from them determine, whether any, and if any, what damages should be allowed beyond the actual injury to the person or property? If facts beyond the act are to be allowed to aggravate, why should not like facts be allowed to mitigate this class of damages? Where, for instance, a man had been guilty of frequent, indecent exposures of his person in public streets, accompanied by obscene language and gross insults to females, and had persisted in such a course, until a body of his townsmen, indignant and outraged, seized him and inflicted punishment, and carried him away and confined him for a day, or other like proceedings; and for this assault and battery and imprisonment an action is brought and a claim set up for recompense for injured feelings, indignity and for punitive damages. At the trial, he proves these acts,—rough handling, and degrading treatment, and personal imprisonment, and makes out a case of apparently inexcusable interference with his liberty and his person, and his sense of self-respect. The defendants cannot show that he did or said anything at the time of the arrest. But are they to be precluded from showing anything in mitigation of such a claim? The law is fully vindicated when it gives such a man his full, actual damages. When he asks for more, he opens a new ground for his opponent, who may well say you have no fair claim for damages on this ground, for your own conduct and language aroused the indignation which led to the acts complained of.

There is an instinct, or, if not quite that, a dictate of common sense, which it is neither wise, or hardly possible for the law to disregard,—that a man should not have pecuniary recompense for injured feelings or public degradation, when he has himself outraged the feelings of another, or so conducted as justly to excite public odium by open contempt of the decencies of life. The old legal requirement, that he that asks for redress "must come into court with clean hands," at once occurs to us. The law will protect the hand from actual violence upon it, although it may sadly need ablution, but beyond this will require "a show of hands" before it will adjudge damages for an alleged defilement.

The ruling of the judge, in this case, was peremptory and

unqualified, that the evidence made out no legal defence, and that the verdict must be for the plaintiff "to the full extent of the damages sustained by the injuries to the plaintiff's person, and for detention."

If, after this ruling, the defendant had consented to a default, and the case had come before a judge to determine the damages, and the same claim for cumulative and exemplary damages had been made and pressed, would any judge have excluded, in the hearing before him, the evidence offered in this case? If he had, how could he determine the degrees of aggravation or extenuation, or come to any satisfactory conclusion on the matter of damages? As before said, the jury in this case were in the same condition, after the ruling, as a judge would have been after default.

When we consider the nature and the grounds of this claim for exemplary or punitive damages, it is difficult to see why the evidence of provocation or mitigation, if allowed at all, should be restricted to the time of the overt act. What happened then may, and generally would, give a very partial and insufficient view of all the circumstances which in truth belong to the matter in question, and serve to aggravate or diminish the injury to the feelings, or the malice of the act. Every one sees this at a glance.

We think it will be found, on a careful examination of the cases, that where this rule, limiting the evidence to what transpired at the moment, has been enforced, the claim was to diminish the damages for the actual corporeal injury and loss of time, and no distinction was made between those and exemplary damages. The reasoning to be found in this class of cases is very similar to that found in the decisions at common law, where the degree of guilt is lessened, and a different and distinct offence, of a less degree, is found by reason of proof of sudden and provoked anger; as where a homicide is reduced from murder to manslaughter. But, in such trials, these matters of provocation and sudden anger are introduced, not to mitigate a crime found or admitted, but are strictly matters in defence, and modify or give character to the act, in determining what crime has been in fact committed, and are used for that purpose. In such case it becomes important to know whether the act was the result of sudden passion, or whether there had been time for the passions

to cool. But in a civil action for trespass the liability of the party for actual damages does not depend upon the intent or state of mind of the trespasser. He may be liable, if his act was unlawful, although he did not intend to injure any one, and had no anger or ill-will towards the party whose person or property was affected by his illegal act. It is not the motive, or the feelings under which the legal wrong is committed, which determines the character of the act, or the amount of the actual damages resulting from it. It cannot be excused, if legally unjustified, by proof of sudden passion, or the absence of malice or wrong intent.

The analogy, if any, between civil actions and criminal prosecutions, is to be found in the determination of the extent of punishment in the one, and the amount of exemplary or cumulative damages in the other. Although in the trial of criminal cases the evidence may be limited to the time of the occurrence, yet every judge is aware that, in fixing upon the sentence to be awarded, he does not hesitate to hear evidence or statements as to facts and acts and declarations made or done anterior to such time—in order to ascertain, as well as he can, the mitigating or aggravating circumstances connected with the offence. So, in determining the amount of damages in a civil suit, beyond the tangible, as before explained—when there is no question as to the fact that a trespass has been committed, a limitation of the examination into what transpired at the moment would seem to fall far short of what reason and common sense would prescribe. It seems hardly just to require any tribunal to act and determine such questions, and to award damages in the nature of punishment, and withhold from it all knowledge of the facts which may fairly be said to give the moral character of the act, and the actual guilt of the respondent.

We are aware that great care must be taken to confine the examination to such matters as are clearly and directly connected with the acts, or give color or character to it. Mere evidence of general bad character,—or unpopularity, or of acts or declarations of ancient date, or not clearly and really part and parcel of the matter in question, must be excluded. But time is not of the essence of the principle, but fairly established direct connection, as cause or effect. It is impossible to accurately define the limits, so as to reach every case. But there can be no greater

difficulty in the application of this than of many other rules of law.

In the case at bar, the evidence was limited to the transactions of the day on which the assault was committed, and very evidently was of matters connected directly with the acts done. If it had been excluded, after the evidence on the part of the plaintiff had been heard, how could the jury have properly or understandingly determined what punitive damages should be given in vindication of outraged law, or for the indignity and injury to the feelings? They had a right to know, and the defendants had a right to place before them the true relations of the parties, and to show how far the act was wanton, malicious, vindictive, or unprovoked, or how far extenuated by the conduct, declarations, or provocations of the complaining party.

On the whole, after a full consideration of the case, and the cases, we think that the rulings of the judge were not erroneous, but give the rules on this subject which are practical, and in accordance with common sense and the general principles of the law.

Exceptions overruled.

CUTTING, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

This is one of that class of cases, where there existed at the time it occurred, and even at the present time, to some extent, there exists, a degree of unfairness, in judgment and opinion, which renders it extremely difficult to say anything which will be kindly received, or candidly weighed. But we feel compelled to say, that the facts of this case, placed beside the verdict of $6.46, certainly do indicate a substantial failure of the suit, if not of justice. The jury must have treated the evidence given in mitigation of damages, as a substantial justification of the assault, battery, and false imprisonment, with all its incidents of humiliation and outrage. The verdict very clearly manifests an opinion in the mind of the court and jury, that the plaintiff was more in fault than the defendants—in short, that the conduct of the plaintiff was reprehensible, and that of the defendants excusable—and that, therefore, it was proper for the court to place its stigma upon the action. This is not said, indeed, in so many words, but it is fairly implied.

This is a result to which courts of justice should never come, except in the most unquestionable cases, where there is no pretence of anything more than a nominal breach of the law, and where the action is therefore clearly vexatious. And it is especially unbecoming for courts to fall into this view, out of respect for, or sympathy with, or dread of, an intensified partisan public opinion. It is the duty and the business of courts, to hold the scales of justice evenly and firmly between the most embittered partisans of contending factions in the state, when such become suitors before them.

We might better have no courts, than to have them echo the varying surges of an ever-changing and baseless public sentiment. In a case like the present, it would be far better to have the court instruct the jury, in so many words, that the plaintiff's disregard of the common courtesies and decencies of life, justified the defendants in inflicting such punishment upon him, as would teach him not to repeat the offence, and to conduct with more circumspection in the future, than to have left the case to the jury, in such a slipshod way, as to bring about the same result exactly, but without any technical violation of the rules of law. And we must say, it seems to us that the charge of the court below, and the opinion of the full court, although clearly not so intended, must have operated in that direction.

Possibly some may claim, that upon a nice construction, there was no error in law, and all agree that courts cannot be expected always to control the waywardness or the prejudices of juries. But this is generally urged, where courts desire to throw their own responsibility upon the irresponsibility of the jury. And it seems to us the charge to the jury, in this case, afforded the jury an excellent opportunity to punish the plaintiff, and at the same time to compliment the defendants for taking the plaintiff in hand, and applying the rules of Lynch law to him, in the summary mode they did. This was all very well, provided it were the business of courts to administer Lynch law, or to moderate the strictness of the existing law. But as that is not the fact, but the contrary, it seems a peculiarly unfortunate distinction which the court have attempted to make in this case, between compensatory and exemplary damages, and to allow of the mitigation of one and not of the other.

If there be, in fact, any such distinction in the law, it should certainly be differently stated from what it seems to have been in the trial of this case, or it would be very likely to be misapplied by the jury, as it certainly was here.

The error in the charge seems to be in treating "the injury to the plaintiff's feelings, the indignity and the public exposure," as forming no part of the *actual damages* in the action. Nothing could be further from the truth; since these things not only constitute a portion of the actual damages, but the principal portion. It is scarcely possible to conceive any proposition more unjust or unreasonable—not to say absurd—than to suppose that in a transaction like that, through which the plaintiff was dragged by the defendants, that the actual "injury to his person and his detention" embraced all for which he was entitled to compensation under the head of actual damages.

It is not probable, indeed, that the plaintiff was of that delicate organization, that he would be likely to suffer any irreparable damage merely from the insult and indignity, for if so, he could not have said what he did. But there are many persons who, from similar treatment, might have been ruined for life; and the rule of law is the same in all such cases. And there is no case, except the present, so far as we have noticed, which attempts to discriminate between corporeal and external injuries, and those which affect the sensibilities. These latter, are those which form the chief ingredient of damages in this class of actions. If these latter are to be excluded from consideration, or justified by *public sentiment*, there might better come an end of all pretence of the administration of justice. It is the direct and sure mode of encouraging a resort to force for remedy and redress.

We know that some very able writers, and among them the late Prof. Greenleaf (2 Evidence, § 253 and n. *et seq.*), contend for the rule, that in no case are

exemplary or punitive damages to be given, but that in all cases they should be confined to making *compensation* to the plaintiff. But no writer, or judge, to our knowledge, has ever before attempted to limit the actual damages to which the plaintiff was in all cases entitled *by way of compensation*, to loss of time and injury to the person, in cases of trespass and false imprisonment. Mr. Sedgwick (Dam. 665, n. 1), says, that "all *rules*, or rather definite principles of damages in civil actions, must be referred either to compensation or punishment." No one, we suppose, would for a moment deny that the plaintiff, in an action of this character, is entitled to recover damages for "the injury to his feelings, the indignity, and the public exposure;" and it would seem to be equally improbable, that any one should hold, that such damages were in the nature of punishment to the defendant, and only recoverable under that head.

The truth unquestionably is, in the present case, that the court have mistaken the application of their own rule, and thus, as it seems to us, have presented the whole case in a most unfortunate aspect—very much in that of an excuse and an apology, if not a full justification of Lynch law, than which nothing could have been further from its intention.

We hope no one will be simple enough to suppose that we feel any other than the most unqualified disgust and contempt for such sentiments as were expressed by the plaintiff, on the occurrence of the most disgraceful, as well as the most unfortunate event, which has ever occurred in our past history. The only possible mode of accounting for such folly, in speech, is that folly on one side naturally leads to counter folly upon the other, and despotic public opinion naturally provokes foolish words. But we trust it is not needful to inform the profession, and especially the courts, in this country, that the high privilege of free speech is not created, or maintained, for the exclusive, or the chief benefit of wise and discreet men. They will do very well without any such protection. But it is intended for the protection of every class of the most ranting fools, and the vilest blackguards, and the most infamous blasphemers, except as they are liable to some restraint by the firm and wise administrators of the criminal and civil law of the land. These are the only men who require protection at the hands of the administrators of the law; and when we allow ourselves to be cheated with the delusion that the simple and degraded, or the offensive and coarse-grained, do not deserve the highest protection of the law, we approach a point of timeserving, which is but one degree removed from actual corruption, of which we already begin to hear charges, in some quarters, but we trust wholly without foundation.

We regret, in this case, the affirmance of the principles of the charge in the court below by a court of such high character, although done in a mode, and for reasons, which show the high dignity and purity of the tribunal, and do also show, as it appears to us, that an unfortunate misapplication of the very principle upon which the case is decided, must have occurred in the court below. We know the learning and ability of the court from which the decision comes; and we are always proud to welcome its members among our most esteemed friends; but we cannot shut our eyes to the fact, that the substantial damages in this action were blinked out of sight, and disregarded by the jury, upon grounds which are flagrantly in violation of the leading doctrine of the decision, viz., that actual and compensatory damages cannot be denied upon any ground of provocation

short of an actual justification of the assault, battery, and false imprisonment, which was not attempted in this action.

The testimony offered and received in mitigation of damages in this action, might well enough have been received, upon the question of punitive or exemplary damages, but it was not of a very satisfactory character upon that head even. The only portion of it which seems to afford any just apology for the flagrant misconduct of the defendants, was the stupid blunder of the provost-marshal in directing the plaintiff to be "detained." This had some fair tendency to vindicate the good faith of the defendants in arresting the plaintiff. But what can be said of their after-conduct in forcibly carrying the plaintiff three miles, and dragging him before a town meeting, and sentencing him to take an oath to support the Constitution of the United States? They might, with the same propriety, have sentenced him to be hanged, or burned to death. And if they had done so and carried the sentence into execution, and been indicted for murder, they should, so far as we can see, upon the principle of this decision, have been permitted to show the plaintiff's provoking bravado talk in mitigation of punishment—or possibly to reduce the verdict from murder to manslaughter.

It does not seem to us that such evidence should have been permitted to go to the jury, upon either the first or second point made in the plaintiff's request to charge, and not upon the third, except so far as it tended to show that the defendants acted under a misapprehension of the law, and in good faith; for punitive or exemplary damages are not given with any reference to the plaintiff's misconduct, within the limits of the law, but solely on account of the malice and wanton misconduct of the defendants, and to admonish them, and others in like case, not to repeat the misconduct. Is there anything in the plaintiff's folly and bravado, naturally calculated to induce the defendants to believe they had any legal right to deal with him in the manner they did? Was not then the charge of the court, and the result of the trial, directly calculated to encourage such abuses of right, such flagrant breaches of the law? Was not the conduct of the defendants malicious, wanton, and intentionally insulting and abusive? Can there be more than one opinion on these subjects? And was not the charge in the court below, the verdict of the jury, and the overruling of the exceptions, all calculated to encourage such conduct, and to discourage such actions? If so, can we fairly expect parties suffering like indignities to appeal to the tribunals for redress? And will not the result of such experiences, in courts of justice, sooner or later, end in a resort to force in all such cases? These are plain questions, but they are fundamental to the very existence of free states and private liberty, both of person and speech. I. F. R.